90-8 (1)
No. 86

Supreme Court, U.S.
FILED
DEC 4 1990
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term 1990

DANIEL MEIS,

Petitioner,

vs.

FRANK GUNTER, GARY GRAMMER, HAROLD CLARKE, JOHN SHAW, MARIO PEART, CHARLES HOHENSTEIN, MAX MERRITT, RICHARD KNIGHT and certain other Nebraska State Penitentiary security personnel with the rank of Sergeant and above whose names are currently unknown, all in their official and individual capacities,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a prison inmate who was disciplined for violating undisclosed rules has standing to assert a claim under 42 U.S.C. §1983 for denial of due process.

PARTIES TO THE PROCEEDING

The parties to the proceeding are:

Daniel Meis, Petitioner and Plaintiff below.

The Respondents and defendants below are:

Frank Gunter
Gary Grammer
Harold Clarke
John Shaw
Mario Peart
Charles Hohenstein
Max Merritt
Richard Knight

Other Nebraska State Penitentiary security personnel with the rank of sergeant whose names are unknown.

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No. _____

In The

Supreme Court of the United States

October Term 1990

DANIEL MEIS,

Petitioner,

vs.

FRANK GUNTER, ET AL.,[1]

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

[1] The other parties to this case are respondents Gary Grammer, Harold Clarke, John Shaw, Mario Peart, Charles Hohenstein, Max Merritt, Richard Knight and certain other Nebraska State Penitentiary security personnel with the rank of Sergeant and above whose names are currently unknown, all in their official and individual capacities.

Counsel, on behalf of Daniel Meis, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, infra 1) is reported at 906 F.2d 364. The opinion of the district court (App. D, infra, 15) is not reported.

JURISDICTION

The judgment of the court of appeals (App. B, infra, 12) was entered on June 26, 1990. A petition for rehearing was denied on September 10, 1990 (App. C, infra, 14). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment to the United States Constitution provides in relevant part that:

> "nor shall any State deprive any person of life, liberty, or property, without due process of law;"

2. 42 U.S.C. § 1983 provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia,

> subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured. . . .

STATEMENT OF CASE

This appeal involves issues raised by Petitioner, Daniel Meis, who at the time of filing and trial of this action was an inmate at the Nebraska State Penitentiary.[2] Petitioner's action is for damages as well as declaratory and injunctive relief under the provisions of 42 U.S.C. § 1983. Federal subject matter jurisdiction is involved under 28 U.S.C. §§ 1331 and 1343. At issue are documents promulgated by the Nebraska Department of Correctional Services and the Nebraska State Penitentiary which govern the conduct of inmates, but which are not available for inmates to review.

Normally, inmates are provided copies of the rules relating to inmate conduct. Upon entry into the Nebraska State Penitentiary the inmate receives an Inmate Handbook which contains the rules and regulations pertaining to inmate conduct. However, the district court found that in various circumstances administrative regulations, operational memoranda and "now hear this"

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[2] Petitioner is presently imprisoned in Wyoming under an interstate compact, but is subject to being returned to the Nebraska Department of Corrections at any time.

memoranda,[3] all of which are unavailable for inmate review, were used as the basis for issuing oral orders as well as written orders governing inmate conduct. According to Nebraska State Penitentiary regulations, violation of a written or oral order is grounds for disciplinary action against the inmate. Consequently, inmates could be, and were, disciplined for acts which they did not know were wrongful. The acts were made wrongful by secret rules contained in the documents at issue.

Petitioner charged and established at trial that his due process rights were infringed because he, like other inmates, was not given notice of the contents of these secret rules governing inmate conduct. Specifically, with respect to Petitioner, the district court found that on at least two occasions he had been convicted and punished for violating these secret rules. (App. D, infra, 18-19).

The district court held that due process requires inmates, like Petitioner, be given notice of the conduct proscribed in the undisclosed rules prior to being disciplined. Because the court found that Petitioner had not received prior notice, the court held that he was entitled to injunctive and declaratory relief. However, the court declined to award him monetary damages.[4]

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[3] Administrative regulations are issued by the Director of the Nebraska Department of Correctional Services and concern the operations of all penal institutions. Operational memoranda are issued by the Warden of the State Penitentiary and concern policies at the Penitentiary. "Now here this" memoranda reflect policies of individual housing units at a particular institution.

[4] The district court did not hold that Petitioner had not suffered injury. Instead, damages were denied because

(Continued on following page)

On appeal, a divided United States Court of Appeals for the Eighth Circuit held that Petitioner lacked standing to assert a constitutional violation. The court concluded:

> Meis has not shown that he himself has ever actually been injured by the lack of access that he complains about, nor has he proved that there is any ascertainable likelihood that he will be harmed in such a way in the future. He therefore lacks standing to make a due-process argument based on lack of access to the documents.

(App. A, infra, 2).

Judge Larson dissented from the majority opinion. Based upon precedent from the District of Columbia Circuit, he determined that Petitioner had "shown more than an abstract interest in these documents . . . ." *Id.* at 11 (Larson, Senior District Judge concurring and dissenting).

REASONS FOR GRANTING THE PETITION

This case presents important questions concerning the ability of prisoners to seek redress for violations of their constitutional rights. The court of appeals has held that an inmate, situated as Petitioner, lacks standing to seek redress of an acknowledged constitutional deprivation. While finding that the Petitioner had a constitutional interest implicated, the court of appeals

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(Continued from previous page)

Petitioner had not carried his burden in proving substantial damages from the failure to provide notice. (App. D, infra, 29).

nonetheless ignored the district court's findings that Petitioner's rights had been infringed and ruled that Petitioner lacks standing. As a result, the court of appeals has used standing to "slam the courthouse door" on inmates that have in fact suffered a violation of their constitutional rights. *Barlow v. Collins*, 397 U.S. 159, 178 (1970) (Brennan, J. concurring in result and dissenting).

The decision of the court of appeals seriously misconstrues this Court's prior decisions on the issue of standing. Similarly, as Judge Larson noted in dissent, the court of appeals' decision conflicts with the District of Columbia Circuit's holding in *Ramer v. Saxbe*, 522 F.2d 695 (D.C. Cir. 1975). Consequently, review of the decision below is essential.

A. THE COURT OF APPEALS ERRONEOUSLY FOUND THAT PETITIONER LACKED STANDING.

In order to satisfy the requirement of standing, this Court has required that the party must claim an interest which is protected or regulated by statute or the constitution. *Association of Data Processing Service Orgs. v. Camp*, 397 U.S. 150 (1970). In the case at bar there is little dispute that Petitioner has an interest implicated by the Fourteenth Amendment. Both the court of appeals and the district court agreed that Petitioner possesses a due process right to notice and access to the documents at issue in this appeal. *See Wolff v. McDonnell*, 418 U.S. 539 (1974). The sole issue here is whether Petitioner has suffered injury by being denied access to the documents.

In order to invoke the jurisdiction of the courts, a "plaintiff must show that he 'has sustained or is immediately in danger of sustaining some direct injury' as a result of the challenged official conduct and the injury or threat of injury must be both 'real and immediate,' not 'conjectural or hypothetical.' " *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). Applying this criteria, the court of appeals determined that Petitioner had neither sustained injury nor was likely to sustain injury in the future due to the failure to disclose the documents. These findings, however, are erroneous.

A.1 The Court of Appeals improperly rejected the findings of the District Court and employed circular reasoning to deny Petitioner standing.

First, the court of appeals ignored the facts as found by the district court. For example, the district court stated:

> Based on the law and facts adduced at trial, I find that the defendants have violated Meis' right to notice to the extent that they have used [administrative regulations], [operational memoranda], or [now hear this memoranda] as direct written orders without providing him with written notice of a rule's content and of the fact that a breach of the rule would result in disciplinary action.

(App. D, infra, 22)

Similarly, the district court noted that Petitioner's purpose in seeking to obtain these documents was so that he could determine what conduct is prohibited and what

conduct is allowed. Petitioner had received several misconduct reports for violating rules contained in these undisclosed documents several of which resulted in disciplinary action being taken against him.

The court of appeals, however, dismisses these findings, labeling them a "complete abstraction." (App. A, infra, 5). The court of appeals began its analysis by agreeing with the district court "obvious problems of due process arise [when] [t]here has been no fair notice of what [conduct] is prohibited." (App. A, infra, 5). Similarly, the court of appeals accepted the district court's findings that Petitioner had been subjected to seven different disciplinary proceedings without being given prior written notice that his actions were wrongful. However, the court disregards four of these incidents by reasoning that Petitioner had been given oral notice that his actions were wrongful prior to any disciplinary proceedings being initiated against him.

With respect to the other three incidents, the court admits that no prior notice, oral or written, was given. Yet, the court disregards them by focusing on the fact that Petitioner admitted his guilt of the acts. Such reasoning, however, is untenable. The court's holding is tantamount to allowing a state to enact secret laws and then enforce them against an unknowing public. For example, assume that a state enacts a speed limit of 45 miles per hour, but does not publish the law or post signs to that effect. If upon being stopped by police the motorist admits to driving 55 miles per hour, the motorist has admitted his or her guilt to speeding. Under the court of appeals' reasoning the motorist does not have a due process right to notice that driving 55 miles per hour was wrongful. By

admitting guilt, the motorist has in essence waived his or her right to notice.

Obviously, such a result cannot be tolerated. The court of appeals fails to recognize that Petitioner's guilt has no relationship to his right of notice. The court's reasoning on this point is circular. The purpose of notice is to protect people from secret laws. The state cannot be allowed to excuse its unconstitutional actions by claiming that Petitioner was guilty of the acts, while his guilt was obtained by denying him notice.

Similarly, the court of appeals fails to recognize that a person may have a host of reasons, unrelated to his or her guilt, for pleading guilty. This is especially true for a prison inmate like Petitioner. For example, petitioner may have feared retaliation from prison officials for exercising his rights. Moreover, Petitioner may feel that he has little or no chance of prevailing since he will not receive what he considers to be an unbiased tribunal to adjudicate his claims. He may feel that his only recourse is to admit his guilt and hope for a reduced penalty. In any event, it is obvious that Petitioner's admissions should have no bearing upon his right to notice. The issues are totally unrelated.

A.2 The Court of Appeals is incorrect in holding that the threat of injury is too speculative.

The court of appeals furthermore concludes that any claims that the rules would have a future impact on Petitioner were too speculative. To support its conclusion the court of appeals relies upon this Court's decision in

City of Los Angeles v. Lyons, 461 U.S. 95 (1983). This reliance, however, is misplaced.

It is obvious that the facts of an individual case are of paramount importance in determining the question of standing. Facts which may create a high probability of future injury in some circumstances, may not in another. For instance, in *Lyons, supra*, this Court determined that a citizen did not have standing to seek an injunction barring Los Angeles police officers from using chokeholds on suspects. The Court reasoned that a member of the general public was unable to establish with any certainty that he or she would be subjected to chokeholds by police. Such a claim was far too speculative considering the low probability of coming into contact with the police let alone being subjected to a chokehold.

In relying on *Lyons, supra*, the court of appeals has failed to consider the realities of a prison environment. Petitioner is not a member of the general public. He is confined to prison where he cannot escape the rules established there. Moreover, he is under the watchful eye of prison officials every day, if not every instant. One need not speculate to see that every aspect of petitioner's life is directly controlled by these rules. By the very nature of prison, Petitioner will be subjected to the rules contained in these documents. As Judge Larson noted in dissent, Petitioner has "shown more than an abstract interest in these documents. . . . ." (App. A, infra, 11).

Similarly, the Court of Appeals for the District of Columbia Circuit in *Ramer v. Saxbe*, 522 F.2d 695 (D.C. Cir. 1975) noted that unpublished and undisclosed prison

rules have an adverse impact on inmates by the very nature of the inmate's situation. The court recognized:

> [Prison] regulations which affect and control daily activities, rights and disabilities in a special setting and for the ignoring or compliance with which penalties or rewards may be visited, present by their very existence sufficient impact upon a convict's life as to make him an aggrieved person and to afford him standing. . . .

Id. at 701.

It is inescapable that these prison rules will have an impact on inmates such as Petitioner. The very purpose for having such rules is to control an inmate's conduct. Having adopted these rules with such an intention, the state cannot now realistically assert that it is too speculative whether the rules will have such an impact on Petitioner.

Beyond the problems of applying the court of appeals' reasoning to the case at bar, it is obvious that the court's rationale would prove even more troubling when applied as a general rule of law. In fact, it is hard to imagine a case, short of actual prosecution, where a party would have standing. For example, if a state enacts a law which makes it a crime for a woman to obtain an abortion, certainly a pregnant woman who wished to obtain an abortion would have standing under this Court's present decisions. However, under the court of appeals' reasoning this is not true. Even though the woman is a member of the class of people the state's law was intended to affect, her claim would be considered too

speculative. Thus, to have standing she would have to risk actual prosecution.

Such a result is clearly inconsistent with this Court's decisions. This Court has long held that a party need not risk actual prosecution in order to seek redress in the courts. The only requirement is that there is an actual threat of future injury. *See Vally Forge, ETC v. Americans United, ETC,* 454 U.S. 464 (1982).

In sum, Petitioner has satisfied the requirements of standing. He has been injured by the denial of due process and faces future injury by the very nature of his situation. By overturning the district court, the court of appeals' decision misapplies the requirements for standing and is in direct conflict with the District of Columbia Circuit's holding in *Ramer, supra.*

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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November 27, 1990

APPENDIX A

United States Court of Appeals

For The Eighth Circuit

Nos. 88-2841, 89-1207

Daniel Meis, Appellee/Cross-Appellant, v. Frank Gunter, Gary Grammer, Harold Clarke, John Shaw, Mario Peart, Charles Hohenstein, Max Merritt, Richard Knight and certain other Nebraska State Penitentiary security personnel with the rank of Sergeant and above whose names are currently unknown, all in their official and individual capacities, Appellants/Cross-Appellees.	)	On Appeal from the United States District Court for the District of Nebraska.

Submitted: October 13, 1989
Filed: June 26, 1990

Before ARNOLD and MAGILL, Circuit Judges, and LARSON,* Senior District Judge.

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* The Hon. Earl R. Larson, Senior United States District Judge for the District of Minnesota, sitting by designation.

ARNOLD, Circuit Judge.

Daniel Meis, while an inmate at the Nebraska State Penitentiary,[1] brought this civil-rights action for money damages and injunctive relief, pursuant to 42 U.S.C. § 1983, against the Director of the Nebraska Department of Correctional Services and other prison officials. In his complaint, Meis claimed that his constitutional right to due process had been infringed because inmates are not allowed access to all administrative regulations, operational memoranda, and other documents that contain standards of conduct to which inmates must conform. The District Court determined that Meis's constitutional rights had been violated, and held that inmates are entitled to access to some, though not all, institutional documents. No damages were awarded, but the defendants were ordered to pay costs and attorney's fees. Both sides appeal. On defendants' cross-appeal, we vacate the judgment of the District Court. Meis has not shown that he himself has ever actually been injured by the lack of access that he complains about, nor has he proved that there is any ascertainable likelihood that he will be harmed in such a way in the future. He therefore lacks standing to make a due-process argument based on lack of access to the documents. (This is not a class action.) On Meis's appeal, which relates to institutional documents describing programs and opportunities available to inmates, the judgment will be affirmed.

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[1] At the time of this appeal, Meis was imprisoned in Wyoming under an interstate compact, but was subject to return to the Nebraska Department of Corrections at any time.

I.

This case is about various kinds of documents that govern the Nebraska Department of Correctional Services. There are, first of all, Rules and Regulations of the Department, issued pursuant to the Nebraska Administrative Procedures Act, Neb. Rev. Stat. § 84-901 et seq. (Reissue 1987). It is undisputed that Meis and every other inmate was given a copy of these Rules and Regulations upon entry into the state penal system. At issue in this case are three other kinds of documents: administrative regulations, operational memoranda, and "Now Hear This" memoranda. Administrative regulations ("ARs") are issued by the Director of the Nebraska Department of Correctional Services, and concern the operations of all correctional institutions within the Nebraska prison system. Operational memoranda ("OMs") are issued by the chief executive officer of each prison. The OMs involved in this case were issued by the Warden of the Nebraska State Penitentiary, and concern policies specific to that institution. "Now Hear This" memoranda ("NHTs") are documents circulated by prison officials other than the Director of the Department or the Warden of the Nebraska State Penitentiary. NHTs reflect policies of individual housing units, identify programs and opportunities available to inmates, and set forth criteria used to determine eligibility for those programs and opportunities.

Some ARs, OMs, and NHTs are available to inmates in the prison library. Others are not. Defendants claim that they have made available to inmates all the ARs, OMs, and NHTs that they need to see, and that those documents not made available relate, for example, to

institutional security, employee personnel policies, or other subjects of no immediate concern to individual inmates. Meis argues, however, that not all relevant documents are placed in the prison library. He claims that in some instances disciplinary proceedings may be instituted against inmates based upon the contents of an AR, an OM, or an NHT of which inmates had no previous knowledge. In such cases, he argues, due process requires that the inmate charged with a disciplinary offense be given notice in writing of the relevant AR, OM, or NHT.

According to Rule 5 of the Inmate Handbook, a copy of which is issued to every inmate, inmates may be punished only if found guilty of violating a standard of conduct identified in the Code of Offenses. The Handbook contains a copy of the Code of Offenses. The District Court found, however, and we agree, that it is possible for an inmate to be punished on account of conduct that is not completely described in the Code. Under Rule 5(5)II(E), for example, an inmate may be disciplined for "[d]isobeying any verbal or written order or instruction from any employee, or refusing immediately to comply with such direct order." The Code of Offenses itself does not purport to describe the full range of activities of inmates that might be subject to such verbal or written orders. The Code, for example, does not state that an inmate must make up his bed every morning, but disciplinary proceedings have been instituted against inmates who refused to obey a direct verbal order to make up their beds.

In some instances, ARs, OMs, or NHTs themselves are used as "direct written orders" within the meaning of Rule 5(5)II(E). The District Court held that due process

requires that an AR, an OM, or an NHT used in this way be provided in advance to an inmate, if he is to be subjected to disciplinary proceedings. "In advance," in this context, means in advance of a claimed violation. In the abstract, we have no quarrel with such a proposition. If, for example, an OM makes it an offense for an inmate to have in his cell more than three books, and if an inmate, not knowing of the OM, has four books in his cell, and if an officer, upon discovering the four books, institutes disciplinary proceedings against the inmate without first informing him of the three-book limit and giving him a chance to get rid of the fourth book, obvious problems of due process arise. There has been no fair notice of what is prohibited. The difficulty, so far as the present case is concerned, is that the proposition is a complete abstraction. Nothing of the kind has ever happened to Meis. He has been subjected to seven disciplinary proceedings. In four of the cases, verbal orders were involved, and he was given clear advance notice and at least one chance to conform his conduct to the order before any disciplinary proceeding was commenced. In three other cases, no such place of repentance, apparently was afforded, but Meis admitted his guilt on each of the three occasions. He was, for example, cited for failure to work. He was given written notice of the charge and received 20 hours of extra duty as a punishment. He had, however, admitted his guilt. No suggestion is made that on any of the occasions the rules violated were invalid, and Meis did not claim, in any of these disciplinary proceedings, that he was entitled to any kind of documentation in order to allow him to set up a defense of lack of notice.

It is perfectly true, see *Wolff v. McDonnell*, 418 U.S. 539 (1974), that inmates have some procedural rights in connection with disciplinary proceedings. They have a right, for example, to be notified in advance of the disciplinary hearing of the nature of the claimed violation. Meis does not argue that he was not fully accorded this right. They also have a right to reasonable access to information necessary to put on a defense, including prison documents, if there are any, which might show that the order or regulation underlying the claimed violation is invalid. Again, we have no quarrel with the District Court's action in the abstract. It required, paragraph 2(b) of the judgment entered November 14, 1988, that documents that are the source of an officer's authority be readily available to an inmate a reasonable time before a disciplinary hearing on a charge against the inmate for violating a direct oral order given by the officer. Again, however, this proposition of law was disembodied – it is not concretely raised by the present record. There is no showing that Meis, in an attempt to defend himself in a disciplinary proceeding, ever requested an AR, an OM, or an NHT that defendants refused to give him. In the future, if Meis is re-transferred to the Nebraska State Penitentiary, and if a disciplinary proceeding is commenced against him, and if he requests, in order to mount a defense, a particular AR, OM, or NHT, he may well be constitutionally entitled to it, but we have no reason to believe that his request will be refused.

Article III of the Constitution requires that a plaintiff requesting relief show that he has suffered harm, or that harm is threatened or imminent. This requirement has not

been met in the present case. Meis's claims about documents relating to disciplinary offenses do not therefore raise a justiciable issue. Such an issue may be raised in the future, and in that event the analysis contained in the District Court's opinion may be helpful, but we sit to decide only concrete cases and controversies. In order to secure an adjudication from a federal court, a "plaintiff must show that he 'has sustained or is immediately in danger of sustaining some direct injury' as a result of the challenged official conduct, and the injury or threat of injury must be both 'real and immediate,' not 'conjectural or hypothetical.' " *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983), quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962). The present record does not meet this requirement. Possibly other inmates have suffered injuries of a similar nature, but Meis has no standing to raise claims on behalf of them.

II.

On his cross-appeal, Meis argues that the District Court erred in rejecting his claim that he has a constitutional right to various documents, including certain NHTs, that set out programs and opportunities available to inmates and the criteria for their eligibility. These programs include clubs, academic courses, vocational training, religious services, counseling, athletics, community-group involvement, and rehabilitation opportunities for inmates. We agree with the District Court that the Due Process Clause of the Fourteenth Amendment does not, of its own force, give inmates a constitutional right to this kind of information. The Constitution does not itself

require, for example, that Congress, when it enacts entitlement or public-welfare programs, take steps to see that the programs become actually known to their intended beneficiaries. Of course such steps are normally taken in practice, and this represents wise policy, but legislation, once enacted, is effective immediately, and it is not unconstitutional to put on the citizen the burden of learning about it. By the same token, we do not believe that the Constitution requires prison authorities, once they have established programs for the benefit of inmates, to distribute to the inmates the actual documents establishing those programs and specifying who shall be eligible to take part in them. Again, we have no doubt that such information is, in some form, commonly distributed, and that this represents wise policy, but putting the initial burden on an inmate to inquire of someone in authority whether he is eligible, say, for a certain kind of rehabilitation is not so fundamentally unfair as to violate the Due Process Clause.

Meis also argues that there is a state-created property or liberty interest here. He points to Neb. Rev. Stat. § 83-4, 112(2) (Reissue 1987), which provides in pertinent part as follows:

> Committed persons shall be informed of rules and policies concerning . . . inmate rights and developmental opportunities, work or education programs, and complaint procedures. Such rules and policies, or significant portions thereof, shall be posted at conspicuous places throughout the institution.

Meis does not allege that this statute has been violated. As far as we know, defendants have complied with it. Meis's point, rather, appears to be that the documents

themselves, the NHTs, pertaining to the rights and opportunities and programs mentioned, must be made available to inmates. We disagree. The state statute establishes a certain mode of conveying the information in question, and the federal Constitution does not require that another mode, though arguably more effective, be used.

Furthermore, this is not the kind of state statute that would create a liberty interest as that term has come to be used in Fourteenth Amendment jurisprudence. The terms liberty interest and property interest are used in the context of procedural-due-process claims. Thus, if the state says that an inmate is entitled to be paroled if certain substantive factual predicates are established, the inmate has a liberty interest in parole, and it cannot be denied until some appropriate sort of hearing has been held at which the inmate will be allowed to show that the requisite factual predicates exist. *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979). It is commonly said that no liberty interest of this kind is created unless the state statute or regulation involved uses mandatory language and imposes substantive limits on the discretion of state officials. *Dace v. Mickelson*, 816 F.2d 1277 (8th Cir. 1987) (en banc). The statute quoted above certainly uses mandatory language, but it does not create a certain right or entitlement subject to specified factual findings. Rather, it is a direct command that certain information be conveyed. There is no question here of procedural due process. It is not claimed, for example, that Meis was entitled to some sort of hearing before the defendants decided not to deliver to him the NHTs he claims he has a right to. Instead, the state statute requires

unconditionally that information with respect to the programs in question be given to all committed persons. A duty is imposed on prison authorities, and a concomitant right is created in the inmates.

This is the language of substance, not procedure, and the concepts of liberty and property interests are, as we have noted, useful solely in the context of procedural due process. If we were to hold that the sort of state statute involved here created a liberty interest for federal constitutional purposes, we would be greatly expanding the doctrine of substantive due process. We would be holding, in effect, every state statute which imposes a mandatory duty, or creates a legal right, is constitutional in nature, and the violation of every such statute would be a violation of the Due Process Clause of the Fourteenth Amendment. This is emphatically not the law. Many important rights and duties are created by state law entirely without regard to the federal Constitution. A violation of state law, without more, is not the equivalent of a violation of the Fourteenth Amendment. *E.g., Snowden v. Hughes*, 321 U.S. 1, 11 (1944).

For these reasons, we agree with the District Court's rejection of Meis's claim on this part of the case, and to this extent the judgment of the District Court will be affirmed.

III.

In sum, we vacate those portions of the District Court's judgment requiring that certain documents be

delivered to Meis. We affirm those portions of the judgment rejecting Meis's claim that he is entitled to documents describing programs for inmates within the prison. The case will be remanded for entry of judgment accordingly. As a consequence, Meis appears no longer to be the prevailing party, and the District Court should reconsider its award of attorney's fees and costs.

It is so ordered.

LARSON, Senior District Judge, concurring and dissenting.

I agree with the majority that Meis had no constitutional right to the specific documents he seeks which explain prison programs. I respectfully dissent from the majority's holding that Meis has no standing to request access to other documents maintained by Nebraska state prison authorities which set rules of behavior for prisoners and which authorize prison officials to give orders which inmates must follow. I believe Meis has shown more than an abstract interest in these documents, *see Ramer v. Saxbe*, 522 F.2d 695, 700-03 (D.C. Cir. 1975), and I would affirm the District Court's opinion in all respects.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No.88-2841/89-1207NE

Daniel Meis, Appellee/Cross-Appellant, vs. Frank Gunter, Gary Grammer, Harold Clarke, John Shaw, Mario Peart, Charles Hohenstein, Max Merritt, Richard Knight and certain other Nebraska State Penitentiary security personnel with the rank of Sergeant and above whose names are currently unknown, all in their official and individual capacities, Appellants/Cross-Appellees.	)	Appeal from the United States District Court for the District of of Nebraska.

JUDGMENT

(Filed Sept. 20, 1990)

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in part, vacated in part and remanded to the district court for proceedings consistent with the opinion of this Court.

June 26, 1990

A true copy.

Attest:

/s/ Robert D. St. Vrain
CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT
MANDATE ISSUED: 9/18/90

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-2841/89-1207NE

Daniel Meis,	*	
Appellee/Cross-Appellant,	*	Order Denying Petition For Rehearing and Suggestion For Rehearing En Banc.
v.	*	
Frank Gunter, at al,	*	
Appellants/Cross-Appellees.	*	

Appellee/Cross Appellant's suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc. Judge McMillian would have granted the petition.

Petition for rehearing by the panel is also denied.

September 10, 1990

Order entered at the direction of the Court:

/s/ Robert D. St. Vrain

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

DANIEL MEIS,	)	CV86-L-775
Plaintiff,	)	MEMORANDUM
vs.	)	OF
FRANK GUNTER, et al.,	)	DECISION
Defendants.	)	(Filed Sep. 26, 1988)

The plaintiff, Daniel Meis, is an inmate at the Nebraska State Penitentiary ("NSP"). He has commenced this action under 42 U.S.C. Section 1983 to challenge the policy of the director of the Department of Correctional Services ("DCS"), defendant Frank Gunter, and of other DCS employees that prohibits inmates from learning about or having access to the entire sets of the institution's Administrative Regulations ("ARs"), Operational Memoranda ("OMs") and other intra-institutional memoranda, referred to by the plaintiff as Now Hear This memoranda ("NHTs"). Meis, who is a legal aide at the NSP, contends that his due process right to notice has been infringed by the defendants' failure to disclose the ARs, OMs, and NHTs to him. The defendants argue that they have already provided to the inmates those ARs, OMs and NHTs that affect the inmates, either by maintaining them in a file at the inmate library or by posting them on bulletin boards.

As set forth in the uncontroverted facts, filing 60, the ARs contain the official statements of policy that govern all correctional institutions under the control of the DCS, including the NSP. An example is the DCS Rules and

Regulations, Plaintiff's Exhibit 1 and 1A, known as the Inmate Handbook. OMs are statements, derived from ARs, that particularize policy statements made in the ARs to specific institutions, in this case the NSP. OMs are promulgated by the chief executive officer of each institution. ARs and OMs may be amended only by the appropriate authorities.

The availability of one other type of document is also in contention in this lawsuit. Meis seeks the disclosure of NHTs, which include the Adult Inmate Classification Manual, documents that reflect policies of individual housing units, and other documents that identify programs and opportunities available to inmates and that set forth the criteria used to determine whether an inmate is eligible for a particular program or opportunity.

There is no institutional requirement that inmates be shown the ARs, OMs and the amendments thereto. Indeed, the existence, purposes and uses of ARs and OMs are not mentioned in the Inmate Handbook which is provided to each incoming inmate.

On or about February 1, 1986, at the request of Senator Wesely, copies of certain ARs and OMs were placed in the inmate library. The ARs and OMs that are available to the inmates, which are listed in paragraph 15 of filing 60, are subject to removal from the library at any time. The ARs and OMs that have not been made available to the inmates in the library are considered contraband or unauthorized articles for purposes of Rule 5 III[C] of the Code of Offenses, which is outlined in the DCS Rule and Regulation Book.

On or about December 1, 1986, an entire set of ARs, and an entire set of OMs were discovered in Meis' possession. All of the documents were confiscated by NSP employees, including the copies of those ARs and OMs that already had been made available to the inmates in the library. Meis was given a warning that similar conduct in the future would subject him to disciplinary action. Sometime after the warning was given to Meis, the administration decided to make copies of the ARs and OMs that had been available in the library for some time available to each inmate for the cost of copying.

The rule about which Meis was warned is in Rule 5 of the Inmate Handbook. The rule reads:

> III[C] *Possessing or Receiving Unauthorized Articles*. Possessing or receiving unauthorized articles from another person without the approval of the Chief Executive Officer. Any item which has not been issued to an inmate, purchased by him/her through proper institutional channels, or otherwise [sic] specifically approved for his/her possession by the facility administration is an unauthorized article.

At trial, John Shaw explained that all inmate packages, except those that are "legal mail," are opened in the mailroom and inspected. Those packages that do not contain contraband are delivered to the inmate. A record is kept of all those packages that do contain contraband. After the inmate is notified that he received a contraband item, the item is either disposed of by the inmate or returned to the sender. Shaw, under whose authority the mailroom has operated for the last six years, testified that there is no record of any packages for Meis received by the mailroom in November or December of 1986, the time

during which Wesely allegedly sent the complete set of ARs and OMs to Meis. The inference made by the defendants, which apparently prompted the warning to Meis, was that Meis obtained the ARs and OMs in an unauthorized manner in violation of Rule III[C]. Following this incident, Meis filed this lawsuit.

Inmates may be punished for any violation of the Code of Offenses that is in the Inmate Handbook. See Exhibits 1 and 1A. Included in the list of offenses are: IIE. Disobeying a Direct Order; IIJ. Unauthorized Areas; and IIIC. Possession or receiving of Unauthorized Articles. The description of "Disobeying a Direct Order" establishes that a direct order may be either written or oral and that it may come from any employee. The defendants have stated that the correctional officers are prohibited from giving any direct order that is unlawful. This limitation upon the employees' authority is not stated in any of the information that the inmates receive. I note, however, that the parties agree that the "lawfulness" of an order is first determined by reference to the Inmate Handbook then by reference to ARs and OMs.

Defendants' Exhibit 104 consists of several misconduct reporting forms and disciplinary committee action sheets that constitute a record of the violations with which Meis has been charged and the outcome of disciplinary actions taken against him for those violations. Meis has been charged with disobeying a direct order and with disruption of authorized duties for the same conduct on several occasions. On one such occasion, Meis' charges were based upon his failure to make his bed and, on another occassion [sic], the charges were based upon

his failure to remove an object that was blocking the correctional officer's view through the cell window.

The misconduct report that Meis received for failing to make his bed states that Meis had received repeated warnings about the violation. The disciplinary committee dropped the charge on one count, but found Meis guilty of disobeying a direct order for failing to make his bed. Meis' punishment was a reprimand and a warning. The misconduct report that Meis received for blocking the window states that Meis was warned once prior to being reported. The disciplinary committee found him guilty on both counts for his failure to remove the object from his cell window and he received seven days of room restriction and 10 hours of extra duty.

A misconduct report was also completed by a correctional officer who discovered money in Meis' cell. The officer charged Meis with possession or receiving unauthorized articles and with possession of government money without authorization. Meis was found guilty on both counts and sentenced to 25 hours of extra duty. No mention was made in either the misconduct report or the disciplinary committee action sheet as to whether an authorized amount of money had been established by the administration or, if so, what that amount was.

I think it is essentially accurate to observe that the primary reason that Meis wants access to all the ARs, OMs and NHTs is so that he can determine what he is required to do and what he is prohibited from doing to avoid punishment. Meis contends that if he had access to the contents of all the rules, he could determine whether an order was lawful or unlawful and whether his refusal

to obey an order would warrant punishment from the disciplinary committee. The defendants argue that the daily administration of a correctional institution requires the administration to retain a measure of flexibility and subjectivity in regard to the proper handling of problems inherent in a prison setting. One way in which the NSP administrators have been able to maintain order and discipline in the institution is by requiring the inmates to obey any direct order that is given them. The relationship between the ARs, OMs, NHTs, and the Code of Offenses found in the Inmate Handbook calls into question Meis' due process right to notice.

Instead of tackling the disclosure issue according to the type of rule involved, I shall consider four primary functions that the rules serve. The evidence and the uncontroverted facts establish that, at times, the rules are synonymous with direct written orders. At other times, the rules are used to justify the enforcement of direct oral orders. The rules also are used to describe and to define the limitations on programs, services and opportunities that are available to the inmates. Another function of some rules is to explain employment and security considerations to the staff.

Considering my findings of uncontroverted fact, *see* filing 60, and the evidence, I conclude that the inmates are not entitled to notice of all of the ARs, OMs and NHTs, but that in some circumstances they are entitled to notice of ARs, OMs and NHTs that are used as direct written orders, those that lend definition to terms such as "unauthorized" as used in the Code of Offenses, and those that provide the employees with the authority to make direct oral orders.

DIRECT WRITTEN ORDERS

A distinction exists, however, between the type of notice that is required when the alleged violation is of a direct written order and the type of notice that is required when an alleged violation is of a direct oral order. I hold that due process requires the contents of any AR, OM, or NHT used as a direct written order to be furnished to an inmate in writing before the occurrence of the claimed violation of that written order that triggers disciplinary action.

In 1976, this court found that "[i]nmates have a right to notice of rules which govern prisoner conduct, rights and privileges. 'Prior notice of jail rules is indispensable to a subsequent due process enforcement of those rules by the imposition of sanctions or even denial of privileges.' " *Moore v. Janing*, 427 F.Supp. 567, 577 (D. Neb. 1976) *quoting Hamilton v. Love*, 358 F.Supp. 338, 346 (E.D. Ark. (1973). In the same year, the district court in Puerto Rico held that "[t]he concept of due process, guaranteed by the Fifth and Fourteen Amendments, requires at the least that persons confined in [penal] institutions be informed of the rules and of the procedures by which they may be disciplined for a breach [of the rules]." *Martines Rodriguez v. Jimenez*, 409 F.Supp. 582, 594-95 (D.P.R. 1976).

The evidence demonstrated that, at times, ARs, OMs and NHTs are used as direct written orders. Additionally, the evidence indicates that the inmates are not always given notice either of the content of the rules or that the rules are used as direct written orders. *See* Exhibit 18. For example, one NHT states that inmates are required to

return mattresses to bed frames during waking hours. *See* Exhibit 17. Based on the law and facts adduced at trial, I find that the defendants have violated Meis' right to notice to the extent that they have used ARs, OMs or NHTs as direct written orders without providing him with written notice of a rule's content and of the fact that a breach of the rule would result in disciplinary action. For that he is entitled to declaratory and injunctive relief, but, as he has not proved damages, he is not entitled to monetary compensation.

DIRECT ORAL ORDERS

Though the inmates are entitled to advance notice of the ARs, OMs and NHTs that constitute direct written orders, I do not think that the inmates are entitled to advance notification of ARs, OMs or NHTs that constitute the bases for direct oral orders. Inmates know, by virtue of the Inmate Handbook, that they must comply with a direct oral order the instant that it is given to them. This fact distinguishes the extent of the notice necessary for alleged violations of direct written orders from the notice necessary for alleged violations of direct oral orders. Nothing should be gained by the inmates by disobeying direct oral orders, regardless of their unlawfulness. If any direct order, whether lawful or unlawful, is not followed, the DCS employee's immediate response will probably and justifiably be to gain control of the situation and force compliance or to diffuse the confrontational atmosphere.

However, I agree with Meis that some accountability should be required of DCS employees whose orders the

inmates are bound to follow. Direct orders are to be lawful, which I understand to mean in a broad sense that the order must derive from the employees' legitimate authority. A workable solution, and one that is required by the due process clause, is to provide inmates who decide to challenge the validity of orders with a mechanism by which they can argue that the employees, in making their orders, acted outside the bounds of their authority.

That Meis has a liberty interest in remaining free from punishment that includes the loss of good time credit has been established affirmatively by the Court in *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974). Because Meis is subject to losing good time credits or receiving a sentence of disciplinary segregation for violating the Code of Offenses in the Inmate Handbook, (*see* Exhibit 1A at Chapter 6, Rule 009), I find that he is entitled to the minimum requirements of due process that are discussed in *Wolff* if charged with such a violation.

In *Wolff*, the Court stated that "[s]ince prisoners in Nebraska can only lose good-time credits if they are guilty of serious misconduct, the determination of whether such behavior has occurred becomes critical, and the minimum requirements of procedural due process appropriate for the circumstances must be observed." *Id.* The Court defined the due process that is "appropriate for the circumstances" to include "advance written notice of the claimed violation and a written statement of the factfinders as to the evidence relied upon and the reasons for the disciplinary action taken." *Id.* at 563. The Court explained the purpose of requiring advance written notice:

> "We hold that written notice of the charges must be given to the disciplinary-action defendant in order to inform him of the charges and to enable him to marshal the facts and prepare a defense. At least a brief period of time after the notice, no less than 24 hours, should be allowed to the inmate to prepare for the appearance before the Adjustment Committee."

Id.

Whether the NSP's process provides Meis and the other inmates with notice of the violations for which they can be charge sufficient to permit them to marshal facts and prepare their defense is at issue. By way of the Inmate Handbook, all the inmates have notice that they must obey all direct orders or suffer the consequences of disciplinary action. The inmates have the right to challenge the validity of misconduct reports at informal or formal hearings. However, these hearings lose their usefulness if the inmates do not have any way of attacking the "lawfulness" of the direct order they are accused of violating.

Though the Court in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950), was not presented with a case involving the due process rights of lawfully incarcerated persons, the Court's observation about the notice requirement of the due process clause is helpful. The Court explained that "when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Id.* at 315.

In cases in which a DCS employee's authority to render a direct oral order is derived from a policy statement or rule contained in an AR, OM or NHT, I conclude that the notice requirement of *Wolff* demands a more detailed notification than NSP inmates presently sometimes receive. This is true for example, when the charged offense is disobeying a direct oral order about being in an unauthorized place or possessing some unauthorized article.

If the notice is to have any meaning at all under the *Wolff* analysis, it must provide the inmate with sufficient information to enable him to prepare a defense. Affording an inmate the right to contest the charge, without giving him the information with which he can argue that the grounds of the underlying violation were unlawful, is offering a right without means to vindicate it.

When a disciplinary charge is made, the administration must make the AR, OM or NHT that is the source of the officer's authority readily available to the inmate a reasonable length of time before the disciplinary hearing. This may be accomplished in any way that affords to the inmate the wording of the applicable AR, OM or NHT – such as by giving him a copy of it; or by identifying for him the AR, OM or NHT by number, title or other suitable way, and making a copy of it readily available to him in the prison library or on a bulletin board in his housing unit. There is no requirement that the inmate have the documents before a charge is made and no prohibition against the prison's treating them as contraband when they are not made available in connection with a pending charge or otherwise.

REGARDING INMATE PROGRAMS AND SERVICES

Various documents, other than ARs and OMs, set out programs and opportunities available to inmates and the criteria for eligibility. Programs such as clubs, academic education, vocational training, religious services, counseling, athletics, community group involvement, and rehabilitation opportunities are involved.

Section 83-4,112(2) Neb. Rev. Stat. (1943), as amended, says:

> "Committed persons shall be informed of rules and policies concerning . . . inmate rights and developmental opportunities, work or education programs, and complaint procedures. Such rules and policies, or significant portions thereof, shall be posted at conspicuous places throughout the institution."

This statute does not, in my judgment, create a liberty interest in the plaintiff. *Hewitt v. Helms*, 459 U.S. 460, 467-468 (1983), makes it clear that only significant deprivals raise constitutional issues. It said:

> " . . . [W]e have recognized that broad discretionary authority is necessary because the administration of a prison is 'at best an extraordinarily difficult undertaking,' . . . and have concluded that 'to hold . . . that *any* substantial deprivation imposed by prison authorities triggers the procedural protections of Due Process Clause which subject to judicial review a wide spectrum of discretionary actions that traditionally have been the business of prison administrators rather than of the federal courts.' . . . Thus, there is no 'constitutional or inherent right' to parole . . . and 'the Constitution itself does not guarantee good-time credit for satisfactory behavior while in prison,' . . . Finally,

> . . . the transfer of a prisoner from one institution to another was found unprotected by 'the Due Process Clause in and of itself,' even though the change of facilities involved a significant modification in conditions of confinement, later characterized by the Court as a 'grievous loss.' . . . As we have held previously, these decisions require that '[a]s long as the conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed upon him and is not otherwise violative of the Constitution, the Due Process Clause does not in itself subject an inmate's treatment by prison authorities to judicial oversight.' "

The same court discussed the kinds of interest created by statute that raise due process issues. It said:

> "Except to the extent that our summary affirmance in *Wright v. Enomoto,* [462 F.Supp. 397 (N.D. Cal. 1976), *summarily aff'd,* 434 U.S. 1052 (1978)] may be to the contrary, we have never held that statutes and regulations governing daily operation of a prison system conferred any liberty interest in and of themselves. *Meachum v. Fano,* 427 U.S. 215 (1976) and *Montanye v. Haymes,* [427 U.S. 236 (1976)] held to the contrary; in *Wolff* [*v. McDonnell,* 418 U.S. 539 (1974)], we were dealing with good-time credits which would have actually reduced the period of time which the inmate would have been in custody of the government; in *Greenholtz* [*v. Nebraska Penal Inmates,* 442 U.S. 1 (1979)], we dealt with parole, which would likewise have radically transformed the nature of the custody to which the inmate was subject; and in *Vitek* [*vs. Jones,* 445 U.S. 480 (1980)], we considered the transfer from a prison to a mental institution."

Id. 469-70.

The court also in the *Hewitt* case concluded that there was a protected liberty interest remaining in the general prison population in view of the mandatory language of the statute. I conclude that the loss, or threatened loss, or possible loss of information about developmental opportunities, work or education programs in a prison does not involve such a grievous loss as to implicate the due process clause of the United States Constitution.

It, nevertheless, does implicate the above-quoted statute.

Neither the complaint nor the supplemental complaint has sought to state a claim that is cognizable in this court as a pendent or ancillary claim that is subject to federal court jurisdiction. Accordingly, I do not proceed to decide what rights the plaintiff may have under the Nebraska statute.

ALL OTHER ARs, OMs AND NHTs

Moreover, I acknowledge that the defendants' interests in maintaining discipline and order and in maintaining security and internal safety caution against disclosure of most of the ARs, OMs and NHTs that deal with employment and security. Since the inmates are at no risk of suffering a grievous loss from the administration's decision not to publicize the ARs, OMs and NHTs that concern employment and security, I find no constitutional reason to order the administrators to do so.

CLAIM FOR LOSS OF PERSONAL PROPERTY

As to Meis' claim for the taking of his personal property from his storage cabinet, I find that there is an adequate state remedy within the meaning of *Parratt v. Taylor*, 451 U.S. 527 (1981), and this court, therefore, should provide no remedy, whether the property was wrongfully taken or not.

CONCLUSION

There is mention in the complaint and supplemental complaint of the equal protection and unreasonable searches and seizures, but the plaintiff has established no claim other than one under the due process clause. He is entitled to declaratory and injunctive relief, but has not carried his burden of proving any damages as a result of having had any document not made available to him after he had been charged with a disciplinary offense.

I see no value in my undertaking to specify by number or otherwise the specific documents of which Meis is entitled to notice, particularly because ARs, OMs, and NHTs are issued or amended often. By the time I will have issued an order, several will be new or changed. I am trying, rather, to describe a standard by which such documents, by whatever designation, may be identified as being subject to due process notice.

Dated September 26, 1988.

BY THE COURT

/s/ Warren K. Urbom
United States District Judge